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Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States
October Term, 1991

FRED H. EDENFIELD, *et al.*,
Petitioners,

v.

SCOTT FANE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a state prohibition of direct, in-person, uninvited solicitation of potential clients by licensed Certified Public Accounts (CPAs), enacted in order to secure the public's trust in the integrity and objectivity of CPAs and to protect consumers, is a valid time, place and manner restriction of a CPA's First Amendment rights of commercial speech?

2. Whether the State of Florida's prohibition of direct, in-person, uninvited solicitation of potential clients by licensed Certified Public Accountants (CPAs), enacted in order to secure the public's trust in the integrity and objectivity of CPAs and to protect consumers, is an unconstitutional restriction of a CPA's First Amendment right of commercial speech?

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OPINIONS BELOW

The decision of the United States Court of Appeals, Eleventh Circuit, was rendered on October 30, 1991. *Fane v. Edenfield* is reported at 945 F.2d 1514, (11th Cir. 1991), and is reproduced herein in the Appendix, at p. A–1. A Suggestion for Rehearing En Banc was filed by Defendants-Appellants, and was denied on December 31, 1991. The Order is reproduced in the Appendix at p. A–20.

The Order from the United States District Court, Northern District of Florida, was entered on September 13, 1990, and is reproduced herein in the Appendix, at page A–4.

STATEMENT OF JURISDICTION

The opinion and judgment of the United States Court of Appeals, Eleventh Circuit, was rendered on October 30, 1991. A timely Suggestion for Rehearing En Banc* was filed with the Court and was denied on December 31, 1991. This Petition for Writ of Certiorari is filed within 90 days of the Final Judgment. The jurisdiction of this Honorable Court is invoked under Title 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following constitutional provisions and statutes are at issue in the instant cause:

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* "A suggestion of rehearing en banc will also be treated as a petition for rehearing before the original panel." *See* Rule 35-6, FRAP with 11th Circuit, *and also Missouri v. Jenkins,* 495 U.S. ____, 110 S.Ct. 1651,1662, 109 L.Ed.2d 31 (1990).

First Amendment to the United States Constitution:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Title 42 U.S.C. Section 1983:

> 1983. Civil action for deprivation of rights. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Section 460.413(1)(m), Florida Statutes (F.S.):

> 460.413 Grounds for disciplinary action; action by the board.-
>
> (1) The following acts shall constitute grounds for which the disciplinary actions specified in subsection (2) may be taken:
>
> (m) Soliciting patients either personally or through an agent, unless such solicitation falls into a category of solicitations approved by rule of the board.

Section 473.301, F.S.:

> 473.301 Pupose.—The Legislature recognizes that there is a public need for independent and objective public accountants and that it is necessary to regulate the practice of public accounting to assure the minimum competence of practitioners and the accuracy of audit statements upon which the public relies and to protect the public from dishonest practitioners and, therefore, deems it necessary in the interest of public welfare to regulate the practice of public accountancy in this state.

Section 473.323(1)(l), F.S.:

> 473.323 Disciplinary proceedings.—
>
> (1) The following acts constitute grounds for which the disciplinary actions in subsection (3) may be taken:
>
> (l) Engaging in direct, in-person, uninvited solicitation of a specific potential client, except to the extent that such solicitation constitutes the exercise of constitutionally protected speech as determined by the rules of the board.

Section 484.056(1)(t), F.S.:

> 484.056 Disciplinary Proceedings.—
>
> (1) The following acts relating to the practice of dispensing hearing aids shall be grounds for both disciplinary action against a hearing aid specialist as set forth in this section and cease and desist action by the department as set forth in s. 455.228 against any person owning or operating a hearing aid establishment who engages in, aids, or abets any such violation:

(t) Canvassing from house to house or by telephone either in person or by an agent for the purpose of selling a hearing aid, except that contacting persons who have evidenced an interest in hearing aids, or have been referred as in need of hearing aids, shall not be considered canvassing.

Rule 21A-24.002, Florida Administrative Code:

21A-24.002 Solicitation.

(1) A licensee may respond to any request for a proposal to provide public accounting services and may provide such services to those requesting same.

(2) A licensee shall not by any direct, in-person, uninvited solicitation solicit an engagement to perform public accounting services: (a) if the communication would violate Rule 21A-24.001 if it were a public communication; or (b) by the use of coercion, duress, compulsion, intimidation, threats, overreaching, or vexatious or harassing conduct; or (c) where the engagement would be for a person or entity not already a client of the licensee, unless such person or entity has invited such a communication.

(3) For purposes of this rule, the term "direct, in-person, uninvited solicitation" shall be deemed and construed to mean any communication which directly or implicitly requests an immediate oral response from the recipient. Uninvited in-person visits or conversations or telephone calls to a specific potential client are prohibited. Indirect forms of solicitation such as giving speeches, conducting educational seminars, distributing professional literature by mail or other forms of delivery

that are not "in-person," writing books and articles, etc., are permitted.

(4) Any form of written communication to a potential client, invited or not, is permissible under this rule provided such communication conforms to the advertising guidelines of Rule 21A-24.001.

STATEMENT OF THE CASE

The 42 U.S.C. § 1983 Complaint was initially filed in the Gainesville District of the United States District Court for the Northern District of Florida by Respondent, Scott Fane, (Fane) a Certified Public Accountant (CPA) in the State of Florida, who alleged that he wished to engage in direct, in-person, uninvited solicitation of potential clients for his public accounting practice and was prohibited from doing so in violation of his constitutional rights.

After stipulation by the parties, the Complaint was transferred to the Tallahassee Division of the U.S. District Court for the Northern District of Florida, and the named defendants were modified to constitute the members of the Florida Board of Public Accountancy in their official capacities.

Petitioner, Fred Edenfield, et al., (Board) answered the Complaint on October 6, 1988, and subsequent thereto on December 8, 1988, Fane moved for Summary Judgment with affidavit. The Board responded to Fane's Motion on January 4, 1989 with affidavit. Fane replied with a supplementary affidavit on January 27, 1989.

After hearing oral argument, the District Court, on September 13, 1990, granted Fane's Motion for Summary Judgment and entered its Order enjoining the Board from enforcing the provisions of Rule 21A-24.002(2),(3), Florida

Administrative Code (F.A.C.), (enacted pursuant to 473.323(1)(l) F.S.) as they apply to CPAs who seek clients through direct, in-person, uninvited solicitation in the business context.

On October 11, 1990, the Board appealed that decision to the Eleventh Circuit Court of Appeals. On October 30, 1991, the Circuit Court entered an opinion, (*Fane v. Edenfield,* 945 F.2d 1514 (11th Cir. 1991). The Board filed a timely Suggestion of Rehearing En Banc which was denied on December 31, 1991. This Petition for Writ of Certiorari follows.

STATEMENT OF FACTS

Fane, as a certified public accountant (CPA) licensed to practice in Florida, was attempting to increase his public accounting practice in the State through direct, in-person, uninvited solicitation, either in person or over the telephone, which actions are prohibited by Rule 21A-24.002, F.A.C. Fane asserted that such activities were commonplace in other states, that he had observed no injury to the profession or the public's perception of the profession in other states where such activities are permitted. He believes CPAs would not be likely to attempt to improperly influence potential clients through solicitation, and that, in any event, the various disciplinary provisions of Florida Statutes and Rules governing public accounting as well as applicable criminal penalties would deter any CPA from engaging in collusion or fraud with a potential client.

The Board presented evidence which stated that the need for regulation of public accountancy in Florida and other states arose from the important public need to protect the integrity of CPAs' opinions on financial statements. As a necessary corollary to this need to protect the integrity and objectivity of the independent attest function, all activities

of CPAs, in their practice as CPAs, are bound up with the rendering of opinions on financial statements.

In recognition of the need to protect not only the actual relationship of independence and objectivity of CPAs vis-a-vis their clients, but also, and most importantly, to protect the public and its perception of the CPA's total independence and objectivity, the Board stated that direct, in-person, uninvited solicitation would be inappropriate as a method by which CPAs should become engaged to perform services for clients. The Board's evidence argued that the ban on direct, in-person, uninvited solicitation is for the protection of users of CPA's opinions on financial statements as well as to protect clients from CPAs engaging in harassment and undue influence.

REASONS FOR GRANTING THE WRIT

I

THE WRIT SHOULD BE GRANTED INSOFAR AS THE DECISION OF THE ELEVENTH CIRCUIT COURT OF APPEALS ERRONEOUSLY APPLIED AND INTERPRETED THIS COURT'S TESTS TO BE USED WHEN REVIEWING APPROPRIATE TIME, PLACE AND MANNER REGULATIONS[1] ON COMMERCIAL SPEECH OF A REGULATED PROFESSION.

The Circuit Court of Appeals, by holding that the rule prohibiting direct, in-person, uninvited solicitation by regulated professionals must be analyzed as a full-fledged

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1 Rule 21A-24.002, Florida Administrative Code (F.A.C.).

content-based restriction on commercial speech, using the test set forth by this Court in *Central Hudson Gas & Electric, Corp. v. Public Service Commission of New York.*, ___ U.S. ___, 110 S.Ct. 2281, 110 L.Ed.2d 83 (1990), has effectively foreclosed the legitimate ability of states to regulate certain forms of client seeking in order to protect the public from the secondary effects of such activities.

This Court has noted on several occasions that states' interests in regulating learned professions, such as certified public accountancy, are extremely important and entitled to great deference, even when under constitutional scrutiny, *see Douglas v. Noble,* 261 U.S. 165, 43 S.Ct. 303, 67 L.Ed. 590 (1923), and *Williamson v. Lee Optical of Oklahoma,* 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1955). Notwithstanding this fact, the panel majority of the circuit court ignored a vital purpose for the enactment of the regulation at issue, i.e., the protection of the general public's trust in the independence and objectivity of CPAs (whose primary purpose for existence as a regulated profession is to both act as and be perceived as independent analyzers, arbiters and judges of the truth or falsity of a business entity's financial statements) and instead has focused on the impact of the rule on CPAs who wish to solicit.[2]

The standard for reviewing a regulation impacting protected speech and determining whether such a regulation can be sustained through a time, place and manner analysis has been fully articulated by this Court most recently in *Barnes v. Glen Theater, Inc.,* ___ U.S. ___, 111 S.Ct. 2456,

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2 This Court has itself recognized the vital importance of CPAs as impartial, independent arbiters in the financial life of the country. *See United States v. Arthur Young & Co.,* 465 U.S. 805,811-821, 104 S.Ct. 1495,1499-1504, 79 L.Ed.2d 826 (1984). Included in such analysis was this Court's observation that not only must CPAs *be* independent, they must be *perceived* to be independent, not only by their clients, but by the public as a whole. Id. at 465 U.S. 819 Ftn 15, 104 S.Ct. 1503-1504.

115 L.Ed.2d 504 (1991), wherein the plurality held[3] that the test to be used is essentially that set forth in *United States v. O'Brien,* 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968). In *O'Brien,* this Court stated:

> "[W]e think it clear that a government regulation is sufficiently justified [as a valid time, place and manner restriction] if it is within the constitutional power of the government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to this suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Id.* 391 U.S. at 376-377, 88 S.Ct. at 1678-79 [Footnote omitted].

There appears little or no question that the rule at issue in the instant cause is within the constitutional power of the state as a legitimate exercise of the police power.[4] The rule likewise furthers substantial governmental interests. The state strongly asserted, through the affidavit of Louis Dooner, CPA, that the vital importance of regulating CPAs in their activities not only in order to protect the public from dishonest CPAs, but also to preserve the public's perception of the independence and objectivity of the profession, must be accepted without serious disagreement, *see U.S. v. Arthur Young, & Co., supra, Mercer v. Hemmings,* 170 So.2d 33 (Fla. 1964). Moreover, as this matter was decided against the state on a motion for Summary Judgment, all evidence must be reviewed in the light most favorable to the State with all

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3 *Barnes v. Glen Theatre, supra,* at 111 S.Ct. 2460-61.

4 *See Ohralik v. Ohio State Bar Ass'n,* 436 U.S. 447, 98 S.Ct. 1912, 56 L.Ed.2d 444 (1978).

facts and reasonable doubts being resolved in the State's favor. *See United States v. Diebold, Inc.*, 369 U.S. 654, 82 S.Ct. 993, 8 L.Ed.2d 176 (1962).

While the regulation at issue does not set forth its ultimate purpose within its own text, it is apparent that the rule is part of an overall state regulatory scheme relating to CPAs[5] — a scheme which includes, as a primary purpose, the protection of the independence of CPAs as well as the public's perception of CPAs as being neutral and uninterested when engaging in the attest function and independently opining upon the financial statements of their clients.

Turning to the third prong of the *O'Brien* test, this Court has held that a regulation may be "content neutral" if the regulation is *justified* without reference to the content of regulated speech, *see Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748,771, 96 S.Ct. 1817,1830, 48 L.Ed.2d 346 (1976), *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41,48-54, 106 S.Ct. 925,929-933, 89 L.Ed.2d 29 (1986). Florida's rule prohibiting direct, in-person, uninvited solicitation, contrary to the finding of the Circuit Court of Appeals, is clearly justified, not by its relation to the content of the speech made by CPAs when engaged in the prohibited form of solicitation, but rather on the manner by which the CPAs are seeking particular potential clients. As was argued to the Circuit Court of Appeals,[6] it is the manner by which CPAs pursue such inherently unregulatable solicitation contacts which forms the basis of the state's concern, and is the reason for the rule prohibiting this manner of client procurement. The state, as noted above, is concerned primarily with protecting not only

5 *Cf.* Chapters 455,473, F.S.

6 *See Fane, supra*, at 945 F.2d 1514,1519, Appendix at p. A-1.

the *actual* independence of CPAs, but also the *perception* of their independence by the general public.[7] This perception can only be maintained by making certain that the public is aware that CPAs are not engaging in the type of inherently unregulatable solicitation which this Court has rightly held may be prohibited.[8] Thus, since the state is concerned with the secondary impact of CPAs soliciting potential clients,[9] the Circuit Court of Appeals' finding that the regulation in question is not content neutral and cannot be justified as a time, place and manner regulation of the type of communications being offered by CPAs is clearly erroneous. This Court must issue the Writ to correct the decision of the Eleventh Circuit Court of Appeals.[10]

Finally, it is apparent that a regulation which prohibits direct, in-person, uninvited solicitation of potential clients, while leaving open all other forms of advertising and solicitation which are not inherently false, fraudulent,

7 *United States v. Arthur Young, supra*, at 465 U.S. 819, 104 S.Ct. 1503-1504.

8 *See Ohralik, supra*, at 436 U.S. 457-458, 98 S.Ct. 1919.

9 Secondary impacts which may well involve undue harassment of potential clients or fraudulent activities on the part of CPAs and their clients, *cf. Ohralik, supra*, at 436 U.S. 464, 98 S.Ct. 1923.

10 As is noted above, the statutes and rule in question in the instant case are silent as to the motivating factors surrounding the legislature's and the regulating authority's purposes in enacting the prohibition. It is axiomatic, however, that statutes and rules are presumed to be enacted only for valid reasons. In addition, the legislature of the State of Florida has found, in enacting its statute regulating CPAs, that a major purpose of the statute is to protect "the public need for independent and objective public accountants..." in order to "...assure the accuracy of audit statements upon which the public relies..." (Section 473.301, F.S.). Thus, it is apparent that the regulation must be related directly to this valid state concern. Given that this is the predominant concern of the legislature and the Board of Accountancy, then any other potential motivating factors are not relevant to the justification for the rule in question, *see City of Renton, supra*, at 475 U.S. 47-48, 106 S.Ct. 929.

deceptive or misleading, more than adequately retains other options for CPAs to get their commercial messages across to potential clients. In addition, as this Court has already stated in *Ohralik, supra,* only by prohibiting direct, in-person, uninvited solicitation can such contacts be regulated. Therefore, it is apparent that after balancing the numerous other methods of commercial soliciting available to CPAs with the limited prohibition relating to direct, in-person, uninvited solicitation, the challenged rule and statutes meet the fourth prong of the *O'Brien* test.[11] The rule is thus narrowly tailored so as to meet First Amendment strictures, *Barnes v. Glen Theaters, Inc., supra,* ___ U.S. ___, 111 S.Ct. at 2463.

In short therefore, this Court should grant the Petition for Writ of Certiorari in order to review the decision of the Eleventh Circuit Court of Appeals which misapplies this Court's articulated time, place and manner analysis on content neutral regulations restricting commercial speech. In light of this Court's long-standing predisposition to give great respect to rules and statutes of the various states regulating learned professions, the decision of the Eleventh Circuit Court of Appeals striking down the instant rule through an inherently flawed analysis of this Court's prior precedents, must be reviewed and corrected so as to reinstate such limited time, place and manner restrictions as those at issue herein.

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11 Requiring that the restriction on alleged First Amendment freedoms may not be greater than that which is essential to the accomplishment of the asserted interest.

II

THIS COURT SHOULD GRANT THIS PETITION FOR WRIT OF CERTIORARI AS THE ELEVENTH CIRCUIT COURT OF APPEALS' DECISION IS CONTRARY TO PRECEDENTS OF THIS COURT RELATING TO REGULATION OF COMMERCIAL SPEECH WHICH ESTABLISH THAT A STATE MAY PROHIBIT DIRECT IN-PERSON, UNINVITED SOLICITATION FOR REMUNERATIVE EMPLOYMENT.

The Circuit Court of Appeals erred in determining that Florida's prohibition did not further the State's interest and that the prohibition was not narrowly tailored to that interest. The court also erred in limiting a state's ability to regulate direct, in-person, uninvited solicitation to those professions involving a "trained advocate," or to the solicitation of the "emotionally vulnerable."[12]

In *Virginia State Bd. of Pharmacy v. Virginia Consumer Council, Inc., supra,* this Court, for the first time, held that commercial speech was entitled to protection under the First Amendment of the U.S. Constitution. "Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information.... It is a matter of public interest that those decisions, in the aggregate, be intelligent and well-informed." *Id.* at 425 U.S. 765, 96 S.Ct. 1827.

The protection afforded commercial speech, however, must be balanced against a state's interest in maintaining

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12 The Eleventh Circuit Court of Appeals' decision is also contrary to a Florida Fourth District Court of Appeal's decision issued immediately before this decision, declaring the same prohibition constitutional. *See State Dept. of Professional Regulation, Board of Accountancy v. Rampell,* 589 So.2d 1352 (Fla. 4th DCA 1991), *appeal docketed,* no. 79,371. (Supreme Court of Florida. Feb. 17, 1992).

the standards of its professions and in protecting its consumers. In *Ohralik v. Ohio State Bar Ass'n, supra,* this Court, in a unanimous opinion, determined that a state could prohibit the direct, in-person, uninvited solicitation by an attorney where the goal for that solicitation was pecuniary gain. *Id.* at 436 U.S. 457, 458, 98 S.Ct. 1919.[13] Special problems, not present with other types of advertising, appear with direct, in-person, uninvited solicitation:

> Unlike a public advertisement, which simply provides information and leaves the recipient free to act upon it or not, in-person solicitation may exert pressure and often demands an immediate response, without providing an opportunity for comparison or reflection. The aim and effect of in-person solicitation may be to provide a one-sided presentation and to encourage speedy and perhaps uninformed decisionmaking; there is no opportunity for intervention or counter-education by agencies of the Bar, supervisory authorities, or persons close to the solicited individual....In-person solicitation is as likely as not to discourage persons...from engaging in a critical comparison of the "availability, nature, and prices"....[I]t actually may disserve the individual and societal interest, ...in facilitating "informed and reliable decision-making."

Ohralik, supra at 436 U.S. 457, 458, 98 S.Ct. 1919.

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13 The attorney had been suspended after offering, for a fee, his services to accident victims immediately after their accident. *Cf. In re Primus,* 436 U.S. 412, 98 S.Ct. 1893, 56 L.Ed.2d 417 (1978) (declared unconstitutional, a disciplinary rule prohibiting attorney solicitation where the attorney used the mail to inform prospective clients that free legal assistance was available from the American Civil Liberties Union).

The premise for these conclusions is that direct, in-person, uninvited solicitation is "*inherently* conducive to overreaching and other forms of misconduct," and that a complete prohibition of such is the only effective manner of regulating such misconduct. *Id.* 436 U.S. at 464.[14] Accordingly, given the State's compelling interest in preventing fraud, undue influence, intimidation, overreaching, and other forms of "vexatious conduct," this Court held that, for the *limited instance* of direct, in-person, uninvited solicitation, a state may enact an outright, prophylactic ban of such communication. *Id.* 436 U.S. at at 462, 464. Similarly, for the limited instance of direct, in-person, uninvited solicitation, the state may enact such a prohibition without proof of *actual* harm to prospective clients; rather, the state may prohibit such solicitation on the basis of the *potential* for overreaching. *Ohralik* at 436 U.S. 466, 467, 98 S.Ct. 1923, 1924. *See also Shapero v. Kentucky Bar Ass'n,* 486 U.S. 466, 472 108 S.Ct. 1916, 100 L.Ed.2d 475 (1988)(same); and *In re Primus, supra,* (showing of potential danger is sufficient).

This Court refined the analysis employed for commercial speech in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n, supra,* where a four-prong test was articulated for determining the constitutionality of governmental restrictions on commercial speech. That test requires that, first, the speech at issue must concern a lawful activity and not be misleading; second, the regulation must serve a substantial governmental interest; third, the regulation must directly further the asserted interest; and finally, the regulation must be no more extensive than necessary to achieve the state's interest. *Id.* 447 U.S. at 566.

In *Shapero v. Kentucky Bar Ass'n, supra,* this Court again discussed the abuses inherent in direct, in-person, uninvited

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14 A report from the Federal Trade Commission found abuses to be *inherent* in face-to-face selling. *Ohralik,* at 436 U.S. 464, 98 S.Ct. 1922, 1923.

solicitation, rejecting the assertion that direct-mail solicitation presented the same potential for abuse as in-person solicitation: "face-to-face solicitation [is] a 'practice rife with possibilities for overreaching, invasion of privacy, the exercise of undue influence, and outright fraud,' " and "unique...difficulties...would frustrate any attempt at state regulation of in-person solicitation short of an absolute ban." *Id.* at 486 U.S. 475, 108 S.Ct. 1922. Direct-mail solicitation suffers from neither of these inherent problems and, by contrast, facilitates the societal interest in informed and reliable decision-making. *Id. See also Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio,* 471 U.S. 626, 641 105 S.Ct. 2265, 2276, 85 L.Ed.2d 652 (1985).

In applying the *Central Hudson* test, the Eleventh Circuit Court of Appeals found that the prohibition met the first and second prong of the test,[15] but that it failed the third and fourth prongs as the prohibition failed to further the state's interest and was more extensive than necessary. This finding was based, in part, on an incorrect reading of this Court's decisions that a state's ability to prohibit direct, in-person, uninvited solicitation is limited to those professions involving "trained advocates," such as attorneys, or to the solicitation of "the emotionally vulnerable." *Fane,* 945 F.2d at 1520, Appendix at A–13. Yet, nothing in this Court's decisions suggests that those decisions should be read so narrowly. Indeed, *Shapero* specifically rejected the proposition that emotional vulnerability provides the predicate for imposition of a prohibition on solicitation. "The relevant inquiry is not whether there exists potential clients whose 'condition' makes them susceptible to undue influence, but whether the

15 Included in the Eleventh Circuit Court of Appeals' finding was a specific finding with respect to the second prong that "Florida's interest in regulating the accounting profession is substantial." *Fane,* 945 F.2d at 1518, n.7, Appendix at A–8.

mode of communication poses a serious danger that lawyers will exploit any such susceptible belief." 486 U.S. at 474.

The predicate for the imposition of a prohibition on direct, in-person, uninvited solicitation is the special responsibility a state bears for ensuring that its consumers are protected from fraud, overreaching, undue influence, and invasion of privacy and for maintaining standards among members of its licensed professions. *Ohralik,* 136 U.S. at 457, 458. This responsibility extends not only to the legal profession, as noted in *Ohralik* and *Shapero,* but to other professions regulated by a State:

> We recognize that the States have a compelling interest in the practice of professions within their boundaries, and that as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions. We also recognize that in some instances the State may decide that "forms of competition usual in the business world may be demoralizing to the ethical standards of a profession."

Goldfarb v. Virginia State Bar, 421 U.S. 773, 792, 95 S.Ct. 2004, 2016, 44 L.Ed.2d 572, 588 (1975). *See also Ohralik, supra* (state bears special responsibility for maintaining standards among its professions). The rationale for this Court's decisions reaches professions who have, or are perceived to have, knowledge beyond that of the solicited client. In such an instance, the client is almost always at a disadvantage and the danger lies with the professional using his specialized knowledge to prey on the client's relative lack of knowledge.

Immediately before the Circuit Court of Appeals issued its decision in this matter, the Fourth District Court of Appeal

in *Rampell, supra,* had before it the same prohibition and declared it constitutional. In accord with *Ohralik,* the Fourth District found that the State has a legitimate interest in regulating in-person solicitation based on the inherently coercive nature of such communications and based on a CPA's superior knowledge of taxes and financial statements. *Rampell* at 1356, 1357. In his dissent in this matter, Judge Edmondson noted:

> But this quoted language [trained advocates] was not at the heart of *Ohralik's* reasoning. I think Ohralik's reasoning reaches professionals other than lawyers.... In-person solicitation is potentially harmful chiefly because lawyers, as professionals, have (and are perceived by lay people to have) specialized knowledge beyond that of their solicited clients.... The client, when compared to the professional is almost always unsophisticated when it comes to the subject of the professional's work. The danger lies with the lawyer who intimidates or baits the potential client with the lawyer's specialized knowledge while simultaneously preying on the client's relative ignorance.

CPAs also have (and are perceived to have) knowledge beyond that of the potential clients which CPAs could well use to entice or to intimidate clients. For example, CPAs provide tax advisory services and financial management services to clients, when many of these prospective clients may be ignorant of their potential rights and their potential liabilities. To think that clients

> may be as vulnerable to a seemingly knowledgeable CPA as accident victims are to an ambulance chasing attorney is not unreasonable....

Fane, 945 F.2d at 1521, Appendix at A–15, 16.

Undeniably, this reasoning applies to the accounting profession and the services that profession provides to consumers. Florida has long subjected accountancy to regulation pursuant to its police powers. Like the practice of law, the practice of accountancy is a highly skilled and technical profession, in which years of education and training are required. Both professions must struggle with an intricate system of statutes and regulations. The potential for confusion as to the nature or need for such services by laymen is as great for accounting services as it is for legal services.

Additionally, only CPAs may provide attest services. Attest services refer to the process by which a CPA scrutinizes financial statements prepared by an entity and expresses an opinion as to whether the entity's financial position and results of operation are fairly presented in accordance with generally accepted accounting principles. Such an opinion may only be issued by a licensed CPA, and its issuance is subject to state regulation and rules. *See Florida Accountants Ass'n v. Dandelake,* 98 So.2d 323 (Fla. 1957).

Unlike an attorney whose duty it is to present his client's case in the most favorable light:

> An independent certified public accountant performs a different role. By certifying the public reports that collectively depict a corporation's financial status, the independent auditor assumes a public responsibility transcending any employment relationship with the client. The independent public accountant performing this special

> function owes ultimate allegiance to the corporation's creditors and stockholders, as well as to the investing public. This "public watchdog" function demands that the accountant maintain total independence from the client at all times and requires complete fidelity to the public trust.

United States v. Arthur Young & Co., supra, at 465 U.S. 817, 818, 104 S.Ct. 1502, 1503. If necessary, a CPA is required to take positions adverse to his client's interest. Yet, it is this independence and integrity by CPAs in providing attest services that make attest services so valuable to commerce within the State of Florida.

Perhaps unlike any other service, the provision of attest services serves a critical link in our free-market economy. Creditors, stockholders, investors, and others rely upon opinions of CPAs for assurance regarding the financial information of others. Independent certification assists in ensuring that financial statements contain financial information which is fairly presented in accordance with generally accepted accounting principles. Such fairly presented financial information is essential, in a free-market economy, in order to allocate economic resources efficiently. *See Rampell, supra,* at 1356. This Court recently recognized, it is not only the fact, but also the appearance of independence and accuracy by CPAs in their attest capacity, which is so essential to commerce. *United States v. Arthur Young,* 465 U.S. at 819-20, n.15, 104 S.Ct. 1504. Without this appearance and reassurance, creditors and others would have little confidence in an entity's financial statements. Thus, the CPA acts as a balance between management's interests and the public's need for objective, accurate disclosure of financial information.

This balance, however, could be upset, or appear to be upset, if CPAs were permitted to engage in direct, in-person,

uninvited solicitation of clients. It is not difficult to imagine a situation by which a client could be solicited and tempted to switch CPAs based on the selection of certain alternative accounting treatments. The affidavit of Louis W. Dooner (reproduced herein at p. A–21), submitted to the District Court, and reviewed by the Eleventh Circuit, states in part:

> The only type of solicitation that a CPA may not engage is that that places the potential client in the position of having to make an immediate oral response thus opening the door to overreaching and vexatious conduct by the CPA or conversely, and far more damaging to society, the opportunity for the potential client to place the soliciting CPA in a compromising position as part of the bargain reached since the CPA is obviously in need of business and may be willing to bend the rules. Such activity is not in the best interest of the public which is so dependent on independent opinions on financial statements based on an audit conducted in accordance with generally accepted auditing standards. [*Id.* at p. A–27]

Indeed, Respondent acknowledged this potential for abuse in his Supplemental Affidavit (at p. A–31), where he admits that financial pressures might force a company to seek "to bend the rules" in order to obtain a " 'clean' financial opinion." Although Respondent professes that he would never participate in such, the State has a legitimate, real-world concern that others will.[16] Under this Court's

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16 The issue is of sufficient magnitude that the Securities and Exchange Commission has expressed grave concerns about "opinion shopping" and has stepped up enforcement activities against its improper use. *See, e.g.,* Martin, *An Effort to Deter Opinion Shopping,* 14 J. Corp. Law 419, 430-31 (1980); May, *Accountants and The SEC: How to Avoid the Appearance of "Opinion Shopping",* 15 Sec. Reg. L.J. 154 (1987).

precedents of *Ohralik, Shapero,* and *In re Primus,* the state need only show *potential* for abuse in order to justify its prohibition, and not *actual* harm, as required for other forms of commercial speech. *See Ohralik* at 436 U.S. 466, 467, 98 S.Ct. 1923, 1924; *Shapero* at 486 U.S. 472. The State has met this burden.

There is simply no doubt that the State's interest in ensuring that the services provided by CPAs are performed in a manner in which creditors and others in the State will have confidence, is paramount. The State has a legitimate interest in the regulation at issue for it to pass scrutiny under decisions of this Court, and it cannot be doubted that the State, by enacting a prophylactic ban, has acted in a very direct and causal manner to prevent these evils and to maintain the professional standards of CPAs in the State. The Eleventh Circuit therefore erred in its decision and in restricting the holding of this Court's decisions to solicitation by "trained advocates" or of the "emotionally vulnerable."

The Circuit Court of Appeals' decision is also in direct conflict with this Court's precedents as to the fourth prong of the test, i.e, that the regulation be no more extensive than necessary to achieve the state's interest. The court erred in holding that the prohibition on direct, in-person, uninvited solicitation "could be served equally well by existing regulations imposed on the accounting profession or by a more limited restriction of the protected speech." *Fane,* 945 F.2d at 1520, Appendix at A–10, 11. In *Ohralik,* the Court specifically recognized that because of the "inherently coercive" nature of direct, in-person, uninvited solicitation, no other effective regulation exists except an outright, prophylactic ban:

> If appellant's views were sustained, in-person solicitation would be virtually immune to effective oversight and regulation by the state or by the legal profession, in contravention of the State's strong interest in regulating members of the Bar in an effective, objective, and self-enforcing manner. It therefore is not unreasonable, or violative of the Constitution, for a State to respond with what in effect is a prophylactic rule.

Id. at 436 U.S. 466, 467, 98 S.Ct. 1924. *See also Shapero,* 436 U.S. at 473 (The "unique" regulatory problems of direct, in-person, uninvited solicitation justify a complete ban). Although the Eleventh Circuit Court of Appeals asserts the prohibition is too broad as it covers activities besides attest services, the prohibition is no broader than that approved in *Ohralik* as being necessary to maintain the professional standards of all attorneys, not just personal injury attorneys. The State has recognized that direct, in-person, uninvited solicitation is inherently unregulatable and that it must be prohibited in order to protect the standards of the profession and the public. As such, the Circuit Court of Appeals' decision is in conflict with Supreme Court precedents.[17]

Contrary to the 11th Circuit Court of Appeals' decision, there are no alternatives or less restrictive means of regulating the conduct at issue. The regulations cited by the Circuit Court of Appeals can only be utilized on an after-the-fact basis, based upon *subsequent* discovery of the misconduct. The State, by this regulation, is attempting to provide an effective and objective mechanism before misconduct occurs. The State has a compelling interest in such regulation, which interest permits the State to apply, as *Ohralik* found, remedies before the fact. To have dealt with this situation

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17 The Fourth District Court of Appeal found in *Rampell, supra,* in accord with *Ohralik,* that, because direct, in-person, uninvited solicitation is nearly impossible to police, the State's decision to enact a prophylactic ban on such communication constitutes a "reasonable fit" between the regulation and the substantial state interest served. *Rampell, supra,* at 1357.

in another manner, would have required an army of investigators, and yet, in the end, would still not have been as effective as an outright prohibition. No effective pre-screening mechanism, such as that approved in *Zauderer* for advertising, is available to prevent the problems associated with direct, in-person, uninvited solicitation. Accordingly, the alternatives proposed by the lower court fail *Central Hudson's* requirement that the State's interest "be served *as well* by a more limited restriction." *Id.* 447 U.S. at 564 (emphasis supplied). As such, the regulation passes the fourth prong of *Central Hudson* and should be declared constitutional.

If allowed to stand, the Eleventh Circuit Court of Appeals' decision will substantially curtail this Court's decisions permitting states to regulate professions and protect consumers. The Eleventh Circuit's decision will limit *Ohralik* and other decisions of this Court to being applicable only to attorneys and the emotionally vulnerable, eviscerating a state's ability to regulate in any manner the commercial speech of other professions. The State of Florida has enacted similar prohibitions as to other professions. *See, e.g.*, § 460.413(1)(m), Fla. Stat. (solicitation by chiropractors prohibited); § 484.056(1)(t), Fla. Stat. (solicitation of optical devices and hearing aids prohibited). The Eleventh Circuit's decision presents a question of exceptional importance to the State of Florida, the professions which it regulates, and the consumers protected by such regulations.

CONCLUSION

For the above-stated reasons, this Petition for Writ of Certiorari should be granted, and the Court should allow Petitioners to file their brief stating comprehensively why the decision of the Eleventh Circuit Court of Appeals conflicts with several of the decisions of this Court permitting states to prohibit direct, in-person, uninvited solicition.

Respectfully Submitted,

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No. _____

In The
Supreme Court of the United States
October Term, 1991

FRED H. EDENFIELD, et al.,

Petitioners,

v.

SCOTT FANE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

APPENDIX

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FANE v. EDENFIELD

Scott FANE, Plaintiff-Appellee,

v.

Fred H. EDENFIELD, Jr., Richard J. Aboud, Whipple Van Ness Jones, Jr., Margaret F. Struope, Dean F. Denison, William R. Martin, Joseph R. Millsaps, Antonio L. Argis, Jerome A. Schine, in their official capacities as members, Board of Accountancy, Defendants-Appellants.

No. 90-3943.

United States Court of Appeals, Eleventh Circuit.

Oct. 30, 1991.

Certified public accountant (CPA) brought action challenging Florida ban on in-person solicitation by CPAs. The United States District Court for the Northern District of Florida, No. TCA 88- 40264/MMP, Maurice Mitchell Paul, J., granted summary judgment in favor of CPA and Florida Board of Accountancy appealed. The Court of Appeals, Dubina, Circuit Judge, held that ban was impermissible restriction of commercial speech in violation of First Amendment.

Affirmed.

Edmondson, Circuit Judge, filed dissenting opinion.

1. Federal Courts - 754

Conclusions of law rendered upon summary judgment are subject to same standard of appellate review as any question of law brought on appeal.

2. Constitutional Law - 90.2

Florida statute prohibiting certified public accountants (CPAs) from engaging in in-person solicitation was impermissible restriction of commercial speech in violation of First Amendment because statute did not directly advance state's asserted interest in protecting CPA's integrity, independence and objectivity while performing the attest function, and justification offered for ban could be served equally well by existing regulations imposed on accounting profession or by more limited restriction of protected speech. U.S.C.A. Const. Amend. 1; West's F.S.A. § 473.323(1)(l).

3. Constitutional Law 90.2

Blanket prohibitions on commercial speech are disfavored, and mere possibility that isolated abuses or mistakes may occur does not justify total ban on certain mode of protected commercial speech. U.S.C.A. Const. Amend. 1.

4. Constitutional Law - 90.2

State restricting commercial speech is not required to employ least restrictive means to accomplish its ends, but must utilize means narrowly tailored to achieve desired objective. U.S.C.A. Const. Amend. 1.

5. Constitutional Law - 9O.2

State restricting commercial speech bears burden of justifying its restrictions. U.S.C.A. Const. Amend. 1.

6. Constitutional Law - 90.2

Prophylactic restraints on commercial speech based on unsupported assertions or unsubstantiated fears are not acceptable. U.S.C.A. Const. Amend. 1.

7. Constitutional Law - 90(1)

If state can combat wrongdoing by direct means, it cannot use its interest in foreclosing harm to justify broad-scale restraints on speech. U.S.C.A. Const. Amend. 1.

8. Constitutional Law - 90(3)

Constitutionally permissible time, place and manner restriction must not be based upon content of speech. U.S.C.A. Const. Amend. 1.

9. Federal Courts - 611, 612

Court of Appeals has discretion to consider argument first made on appeal, and may exercise that discretion if omitted issue involves pure question of law and if refusal to consider it would result in miscarriage of justice.

10. Federal Courts - 612

Court of Appeals' consideration of legal arguments not presented to district court is especially appropriate on appeal from summary judgment.

Appeal from the United States District Court for the Northern District of Florida.

Before EDMONDSON and DUBINA,Circuit Judges, and ESCHBACH,* Senior Circuit Judge.

DUBINA, Circuit Judge:

The appellants, all of whom are members of the Florida Board of Accountancy ("the Board"), appeal the district court's grant of summary judgment in favor of the appellee, Scott Fane ("Fane"). For the reasons which follow, we affirm the district court's grant of summary judgment.

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* Honorable Jesse E. Eschbach. Senior U.S. Circuit Judge for the Seventh Circuit, sitting by designation.

I. FACTUAL BACKGROUND

Fane is a certified public accountant ("CPA") who is certified in New Jersey and Florida. In the mid-1980's, he moved to Florida to set up an accounting practice, and sought to solicit business via in-person contacts with businesses he felt would be interested in his services. Fane was not able to implement his planned solicitation, however, because in-person solicitation by CPAs is forbidden in Florida.[1] The ban only applies to CPAs. Other financial professionals, such as non-certified accountants, bookkeepers, and tax preparers, are not prohibited from utilizing personal contacts to solicit new clients.

Only three other states, i.e., Georgia,[2] Texas,[3] and Louisiana, prohibit in-person solicitation by CPAs. In addition, the accounting boards of twelve other states prohibit in-person solicitation, although the validity of such a prohibition by competing accountants without legislative authorization has been questioned under the antitrust laws. R1-18-1, Exh. D (letter from Anthony Low Joseph, Bureau of Competition, Federal Trade Commission, to Eleanor Weinstock, Florida State Senator (Apr. 28, 1987), comparing Florida's statutory regulation of CPAs' solicitation to its regulation of other professions and the regulation of

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1 Pursuant to Fla.Stat.Ann. § 473.323(1)(1) (West 1991). A CPA's engaging in "direct, in person. uninvited solicitation of a specific potential client" constitutes grounds for disciplinary action. Fla.Admin.Code Ann. r. 21A-24.002(3) (1991) defines a prohibited solicitation as "any communication which directly or implicitly requests an immediate oral response from the recipient." The regulation specifically states that "[u]ninvited in-person visits or conversations or telephone calls to a specific potential client are prohibited."

2 O.C.G.A. § 43-3-35(i) (1988).

3 Tex.Rev.Civ.Stat.Ann. art. 41a-1. § 6(a)(2) (West 1991).

accountants in other states). *See also* Rhode Island Board of Accountancy, 107 F.T.C. 293 (1986).

Fane instituted this lawsuit in an effort to have Florida's prohibition of in-person solicitation by CPAs declared unconstitutional. The Board disputed any constitutional violation created by the proscription. The district court granted Fane's motion for summary judgment and enjoined the Board from enforcing the ban on in-person solicitation by CPAs in Florida. The Board then perfected its appeal to this court.

II. DISCUSSION

[1] The only issue raised by the Board that we need to address is whether the district court correctly determined that Florida's prohibition on in-person solicitation by GPAs is unconstitutional.[4] We review the district court's order granting summary judgment de novo. *Akins v. Snow,* 922 F.2d 1558, 1560(11th Cir.), *cert. denied,* U.S. 320, 111 S.Ct. 2915, 115 L.Ed.2d 1079 (1991). Conclusions of law rendered upon summary judgment are subject to the same standard of appellate review as any question of law brought on appeal. *Morrison v. Washington County, Alabama,* 700 F.2d 678, 682 (11th Cir.), *cert. denied,* 464 U.S. 864, 104 S.Ct. 195, 78 L.Ed.2d 171 (1983), *holding mod. on other grounds, Helicopter Support Systems, Inc. v. Hughes Helicopter Inc.,* 818 F.2d 1530 (11th Cir.1987) (citations omitted).

[2] Fane contends that Florida's prohibition against in-person solicitation by CPAs is an unconstitutional restriction of commercial speech because the restraint does not

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4 The Board also argues that the district court erred by granting summary judgment in this case. Since we do not find any material factual disputes which would require resolution at trial, we see no merit to that argument. We will, therefore, address only the question of law decided by the district court.

further the state's interest in regulating the accounting profession, nor is it narrowly tailored to that end. Fane also maintains that the imposition of the ban upon CPAs, but not on other accounting professionals who perform the same tasks, is a violation of equal protection. The Board argues that the ban is necessary to protect a CPA's integrity, independence, and objectivity while performing the attest function.[5] The Board also argues that the ban is a permissible time, place, and manner restriction that is content neutral.

Commercial speech, i.e., expression that is related exclusively to the economic interests of the speaker and audience, is undeniably entitled to substantial protection under the First and Fourteenth Amendments of the United States Constitution.[6] *Peel v. Attorney Registration and Disciplinary Comm'n,* ___ U.S ___, 110 S.Ct. 2281, 110 L.Ed.2d 83 (1990); *Board of Trustees of State University of New York v. Fox,* 492 U.S. 469, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989); *Shapero v. Kentucky Bar Ass'n,* 486 U.S. 466, 108 S.Ct. 1916, 100 L.Ed.2d 475 (1988); *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio,* 471 U.S. 626,105 S.Ct. 2265, 85 L.Ed.2d 652 (1985); *Central Hudson Gas & Elec. Corp. v. Public Serv. Commn,* 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341(1980); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976). The informational function of advertising forms the basis for the First Amendment's concern for commercial speech. *First Nat'l Bank of Boston v. Bellotti,* 435 U.S. 765, 783, 98 S.Ct. 1407,

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5 The attest function is the issuance of an independent opinion regarding a client's financial stability based on an audit or review of a clients financial statements. Only CPAs perform the attest function.

6 The First Amendment, as applied to the states by the Fourteenth Amendment, protects commercial speech from unjustified governmental regulation. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n,* 447 U.S. 557, 561, 100 S.Ct. 2343, 2348, 65 L.Ed.2d 341(1980).

1419, 55 L.Ed.2d 707 (1978). Commercial speech furthers the economic interests of the speaker while also assisting the consumer audience. *Central Hudson,* 447 U.S, at 561-62, 100 S.Ct. at 2348-49. The importance of the dissemination of commercial information is its benefit to consumers and society. *Virginia State Board of Pharmacy,* 425 U.S. at 764-65, 96 S.Ct. at 1827.

[3] Blanket prohibitions on commercial speech are disfavored. *Shapero,* 486 U.S. at 476, 108 S.Ct. at 1923. The mere possibility that isolated abuses or mistakes may occur does not justify a total ban on a certain mode of protected commercial speech. *Id.* Any restriction of commercial speech requires "the government goal to be substantial, and the cost to be carefully calculated." *Fox,* 492 U.S. at 480, 109 S.Ct. at 3035. For example, the government may ban commercial speech that is more likely to deceive the public than to inform it, *Ohralik v. Ohio State Bar Ass'n,* 436 U.S. 447, 464-65, 98 S.Ct. 1912, 1922-23, 56 L.Ed.2d 444 (1978), or commercial speech that is related to illegal activity, *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations,* 413 U.S. 376, 388, 93 S.Ct. 2553, 2560, 37 L.Ed.2d 669 (1973). In most other contexts, the First Amendment prohibits regulation based on the content of the speech. *Consolidated Edison Co. of New York, Inc. v. Public Service Comm'n,* 447 U.S. 530, 537-38, 100 S.Ct. 2326, 2333-34, 65 L.Ed.2d 319 (1980).

In *Central Hudson,* the Supreme Court articulated the following four-part test for assessing the constitutionality of a restriction on commercial speech:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the

> asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

447 U.S. at 566, 100 S.Ct. at 2351. In applying the *Central Hudson* analysis to Florida's restriction of Fane's commercial speech, the district court found that Florida's prohibition of in-person solicitation by CPAs failed to advance the governmental interest asserted and was more extensive than was necessary to serve that interest.[7]

[4,5] In reviewing the validity of Florida's restriction on in-person solicitation by CPAs, we must determine whether there exists a " 'fit' between the legislature's ends and the means chosen to accomplish those ends...." *Fox,* 492 U.S. at 480, 109 S.Ct. at 3035 (quoting *Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico,* 478 U.S. 328, 341, 106 S.Ct. 2968, 2977, 92 L.Ed.2d 266 (1986)). The relationship between the legislature's means and ends must be reasonable, but does not require perfection; furthermore, its scope must be "in proportion to the interest served." *Fox,* 492 U.S. at 480, 109 S.Ct. at 3035 (quoting *In re R.M.J.,* 455 U.S. 191, 203, 102 S.Ct. 929, 937, 71 L.Ed.2d 64 (1982)). Florida is not required to employ the least restrictive means to accomplish its ends, but it must utilize "a means narrowly tailored to achieve the desired objective." *Fox,* 492 U.S. at 480, 109 S.Ct. at 3035. Florida bears the burden of justifying its restrictions. *Zauderer,* 471 U.S. at 647, 105 S.Ct. at 2279.

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7 The first two prongs of the Central Hudson test are met. The speech in which Fane wishes to engage concerns a lawful activity and is not misleading; Florida's interest in regulating the accountancy profession is substantial.

[6] The Board attempts to justify Florida's proscription of in-person solicitation by CPAs on the basis of the need to preserve and protect the public's ability to rely on the independence and objectivity of CPAs who are, performing the attest function. The Board also contends that because there is no acceptable method of regulating in-person solicitation, a prophylactic rule against its utilization by CPAs is necessary to protect the public. Nowhere in the record, however, do we find that the Board has produced any evidence of any link between in-person solicitation and the likelihood that a CPA will be more likely, or even willing, to engage in dishonest or oppressive conduct during such solicitation. Prophylactic restraints on commercial speech based on unsupported assertions or unsubstantiated fears are not acceptable. *Zauderer,* 471 U.S. at 647-18, 105 S.Ct. at 2279-80. "[T]he States may not place an absolute prohibition on certain types of potentially misleading information...if the information also may be presented in a way that is not deceptive." *In re R.M.J.,* 455 U.S. at 203, 102 S.Ct. at 937. The availability to the general public of commercial information such as that Fane seeks to communicate is valuable enough to justify imposing the burden upon Florida of distinguishing "the truthful from the false, the helpful from the misleading, and the harmless from the harmful." *Zauderer,* 471 U.S. at 646, 105 S.Ct. at 2279. Broad prophylactic rules simply cannot be justified if the protections afforded commercial speech are to remain viable. *Id.* at 649, 105 S.Ct. at 2280-81.

Even if there were evidence before us to indicate that allowing CPAs who perform audit and review engagements to solicit in-person would undermine the integrity of financial statements, that still would not justify the total prohibition of in-person solicitation by all CPAs. CPAs who specialize in many aspects of the accounting profession have no occasion to attest to the accuracy of audits or financial

statements. If allowed at all, Florida's statute must be narrowly tailored to achieve its anticipated objective.

> A statute is narrowly tailored if it targets and eliminates no more than the exact source of the "evil" it seeks to remedy. A complete ban can be narrowly tailored, but only if each activity within the proscription's scope is an appropriately targeted evil.

Frisby v. Schultz, 487 U.S. 474, 485, 108 S.Ct. 2495, 2502-03, 101 L.Ed.2d 420 (1988) (citation omitted). Florida's restriction bans far more speech than is necessary in light of the justification offered for its restraint.

[7] If a state can combat wrongdoing by direct means, it cannot use its interest in foreclosing harm to justify broad-scale restraints on speech. *Shapero,* 486 U.S. at 476, 108 S.Ct. at 1923. Regulatory requirements exist in Florida that can be utilized to preserve the independence of CPAs who perform the attest function. The Board does not offer any explanation as to why those requirements do not adequately afford the protection which it seeks. First and foremost, Fla. Stat. Ann. § 473.315(1) (West 1991) prohibits a CPA from expressing "an Opinion on the financial statements of an enterprise unless he and his firm are independent with respect to such enterprise." Second, CPAs are forbidden from engaging in any kind of fraudulent or deceptive conduct. *See* Fla. Stat. Ann. § 473.323(1)(f), (k) (West 1991).[8] Third, negligent certification of financial statements could give rise to tort liability. The Florida Supreme Court recently held that in certain circumstances, a CPA can be held liable to those persons whom he "knows" will rely on his

8 CPAs who violate Florida statutes regulating the practice of public accounting can be punished by penalties ranging from fines to license revocation. *See* Fla.Stat.Ann. § 473.323(3)(b), (c) (West 1991).

opinion, regardless of whether the CPA is in privity with them. *First Florida Bank v. Max Mitchell & Co.,* 558 So.2d 9, 15 (Fla.1990). The Board has the duty to at least explore less intrusive alternatives than a blanket ban on in-person solicitation imposed on all CPAs. *Shapero,* 486 U.S. at 477-78, 108 S.Ct. at 1923-24. Furthermore, the utilization of an advertising ban to protect the ethical or performance standards of a profession is impermissible. *Central Hudson,* 447 U.S. at 564 ,100 S.Ct. at 2350. *See also Virginia State Board of Pharmacy,* 425 U.S. at 769, 96 S.Ct. at 1829.[9]

[8-10] The Board asserts that speech protected by the First Amendment, whether commercial or ideological, may still be subjected to legitimate time, place, and manner restrictions, so long as those regulations are based on criteria that is content neutral. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37, 45, 103 S.Ct. 948, 954-55, 74 L.Ed.2d 794 (1983). A time, place, and manner restriction seeks merely to regulate when, where, and how the protected activity may take place. *City of Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 46, 106 S.Ct. 925, 928, 89 L.Ed.2d 29 (1986). The regulation challenged by Fane does more, however, for it acts as an unqualified ban on in-person solicitation rather than regulating the details of when, where, and how a CPA may engage in such solicitation. Furthermore, a constitutionally permissible time, place, and manner restriction must not be based upon the content of the speech. *Consolidated Edison,* 447 U.S. at 536, 100 S.Ct. at 2332-33. Florida's regulation of in-person solicitation by CPAs is not content neutral. It is a speaker-specific, unqualified ban on a category of expressive activity. Only CPAs who wish to speak directly to potential clients

9 Because we find that Florida's ban is an impermissible restriction of commercial speech in violation of the First Amendment, we need not address Fane's equal protection argument.

are restrained. The appropriate bounds of time, place, and manner restrictions on commercial speech are clearly exceeded by Florida's statute.[10]

The Board also argues that its position is supported by *Ohralik*, 436 U.S. at 447, 98 S.Ct. at 1913 (upholding a ban on in-person solicitation by attorneys) and *National Funeral Servs., Inc. v. Rockefeller*, 870 F.2d 136 (4th Cir.), *cert. denied*, ____ U.S. ____, 110 S.Ct. 409, 107 L.Ed.2d 374 (1989) (upholding a ban on in-person solicitation by funeral directors selling pre-need burial services). The district court concluded that *Ohralik* and *National Funeral Services* do not apply to this case because the nature of the accounting profession and its soliciting targets differs in material respects from the legal and funeral services professions and their soliciting targets, making the imposition of such a ban on CPAs unnecessary.

As the majority opinion in *Ohralik* indicates, and as Justice Marshall's concurrence makes clear, the holding of *Ohralik* is limited. "[T]he solicitation of business, under circumstances—such as those found in this record—presenting substantial dangers of harm to society or the client independent of the solicitation itself, may constitutionally be prohibited by the State." 436 U.S. at 470, 98 S.Ct. at 1926 (Marshall, J., concurring in part and concurring in

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10 Fane objects to our consideration of the Board's time, place, and manner argument because the Board did not present it to the district court. Although we generally decline to consider a legal theory that was not raised at the district court level, we have the discretion to consider an argument first made on appeal. *Roofing & Sheet Metal Servs., Inc. v. La Quinta Motor Inns, Inc.*, 689 F.2d 982, 989 (11th Cir. 1982). We may exercise that discretion if the omitted issue involves a pure question of law and if refusal to consider it would result in a miscarriage of justice. *Id.* at 989-90. Consideration of legal arguments not presented to the district court is especially appropriate on appeal from summary judgment. *Id.* at 990. Consequently, we have considered the Board's argument, but find that it has no merit.

the judgment). The majority opinion rests on whether an Ohio attorney disciplinary rule had been constitutionally applied to *Ohralik*. *Id.* at 467-68, 98 S.Ct. at 1924-25. Indeed, *Ohralik* did not challenge the rule on its face, and conceded its constitutionality in some contexts. *Id.* at 461-62, 466 n.27, 98 S.Ct. at 1921-22, 1924 n.27. *Ohralik* deals with an outrageous situation in the area of attorney solicitation.[11] Many cases will fall between the extremes of *Ohralik* and cases such as *NAACP v. Button*, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963) and *In re Primus*, 436 U.S. 412, 98 S.Ct. 1893, 56 L.Ed.2d 417 (1978), where solicitation by attorneys is clearly permitted because of its political expression and association value. *Ohralik*, 436 U.S. at 471-72, 98 S.Ct. at 1926-27 (Marshall, J.).

We are presented here with such an intermediate case in the context of another class of professionals—CPAs.13 The possibilities for overreaching, invasion of privacy, exercising undue influence, and outright fraud that the Supreme Court found were cause for concern if lawyers were allowed to solicit in-person are remote in the accounting profession. *See Ohralik*, 436 U.S. at 464-66, 98 S.Ct. at 1922-24 Solicitation by a CPA does not entail tee "coercive force of the personal presence of a trained advocate." *Zauderer*, 471 U.S. at 642, 105 S.Ct. at 2277. Likewise, the solicitation of a business person by an accountant is in no way comparable to the intrusive solicitation of a family member by a salesperson of funeral services at a time of emotional vulnerability. *See*

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11 Ohralik solicited business from two young accident victims, approaching one while she lay in traction in a hospital bed. He employed a concealed tape recorder to assist him in his solicitation efforts and emphasized the contingent nature of his fee to make his offer appear cost-free and irresistible. In addition, he refused to withdraw even when requested to do so by his client and misrepresented himself to her insurance company. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 450-52, 98 S.Ct. 1912, 1915-17, 56 L.Ed.2d 444 (1978).

National Funeral Services, 870 F.2d at 142-45. We agree with the district court that the ban on in-person solicitation endorsed in *Ohralik* and *National Funeral Services* is not necessary to protect the general public from solicitation by a CPA.

III. CONCLUSION

We do not lightly interfere with a state's power to regulate the professions which practice within it. Nevertheless, the state's regulatory power cannot be used to insulate restrictions of constitutionally protected speech from our review for constitutional infirmity. *See Peel*, _____ U.S. at _____, 110 S.Ct. at 2291-92. In this case, Florida's restriction of in-person solicitation by CPAs does not directly advance the state's asserted interest. The justification offered for the ban could be served equally well by existing regulations imposed on the accounting profession or by a more limited restriction of the protected speech. We therefore affirm the district court's order granting summary judgment in favor of Fane and enjoining the State of Florida from enforcing its ban on in-person solicitation by CPAs.

AFFIRMED.

EDMONDSON, Circuit Judge, dissenting:

States have a strong interest in regulating the practice of professions within their borders. *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792, 95 S.Ct. 2004, 2016, 44 L.Ed.2d 572 (1975). Because I believe states are largely free to regulate the professionals which they license, I reach a different conclusion in this case. My view is that Florida's regulation, prohibiting face-to-face solicitation of clients by certified public accountants (CPAs), should stand.

Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 98 S.Ct. 1912, 56 L.Ed.2d 444 (1978), is extremely persuasive and supports Florida's prohibition against in-person solicitation

by CPAs. In *Ohralik*, the Supreme Court upheld a state regulation prohibiting in-person solicitation of clients by lawyers. The Court's reasoning focused on the potential harms that face-to-face solicitation poses for prospective clients. Because in-person solicitation inherently opens the door to "fraud, undue influence, intimidation, overreaching, and other forms of 'vexatious conduct.'" *Id.* at 462, 98 S.Ct. at 1921, the Court recognized the need for a state to enact a rule designed to protect lay people. With advertising generally the recipient may simply turn away, but in-person solicitation may exert pressure and often demand an immediate response from the prospective client, who then has less opportunity for reflection. *Id.* And because in-person solicitation is not visible or otherwise open to public scrutiny, such solicitation is hard to oversee effectively or to regulate. *Id.* at 466, 98 S.Ct. at 1924. The Court, consequently, recognized the need for a state to adopt a prophylactic measure, such as a ban on in-person solicitation, to prevent harm from occurring. *Id.* at 464, 98 S.Ct. at 1923.

In upholding the state's prohibition, the Court in *Ohralik* noted that people contacted [illegible]son might be especially susceptible to a lawyer's pres[illegible] since lawyers are "advocate[s] trained in the art of persuasion." *Id.* at 465, 98 S.Ct. at 1923. But this quoted language was not at the heart of the *Ohralik* reasoning. I think *Ohralik's* reasoning reaches professionals other than lawyers. After all, not all lawyers are trained advocates; now relatively few lawyers are directly involved in litigation or advocacy roles. In-person solicitation is potentially harmful chiefly because lawyers, as professionals, have (and are perceived by lay people to have) specialized knowledge beyond that of their solicited clients. The special leverage, or ability to pressure others, that lawyers have is not so much a function of their oratory skill; instead, it stems from the gap in knowledge between the professional and the lay person. The client, when compared to the professional, is almost always unsophisticated when

it comes to the subject of the professional's work. The danger lies with the lawyer who intimidates or baits the potential client with the lawyer's specialized knowledge while simultaneously preying on the client's relative ignorance. The result is that the client may be pressed to agree to hire the lawyer for fear of losing out on legal rights and remedies that the client does not fully understand or, because the directly solicited client has little time to compare the fees and qualities of competing lawyers, the client may employ the wrong lawyer or agree to pay too much.

CPAs also have (and are perceived to have) knowledge beyond that of their potential clients which CPAs could well use to entice or to intimidate clients. For example, CPAs provide tax advisory services and financial management services to clients, when many of these prospective clients may be ignorant of their potential rights and of their potential liabilities. To think that clients may be as vulnerable to a seemingly knowledgeable CPA as accident victims are to an ambulance chasing attorney is not unreasonable. In addition, by virtue of having the title "certified public accountant" bestowed upon him by a state, a CPA is cloaked with an aura of competence that can overawe prospective clients (just as easily as a persuasive lawyer could) due to the appearance of special knowledge that is associated with his state licensure.** In the light of their specialized, professional knowledge, CPAs can be forceful and persuasive. Anyone who has ever signed, without fully understanding,

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** In Florida, non-licensed tax preparers, bookkeepers, management advisory consultants and the like are permitted to engage in direct, in-person, uninvited solicitation. These people, however, are neither permitted to perform the "attest function," which is specifically reserved for CPAs, nor to hold themselves out as having that assured special competence and reliability that the title "CPA" gives. For the state to condition its grant of special privilege and standing upon the acceptance of additional restraints, including some prophylactic rules, is not unreasonable.

a tax return or other financial statement prepared by a CPA simply because the CPA says "You sign here," knows just how persuasive a CPA can be.

Some differences in the circumstances surrounding solicitation of clients by lawyers and solicitation by CPAs undeniably exist; and, in general, the state's interest in regulating the legal profession (to the extent that lawyers as a group may still be seen as officers of the state's courts) may possibly be a bit greater. But I think for the purpose of constitutional analysis, the two professions are more alike than they are different. For instance, it may well be true that in most audit engagements potential clients of CPAs will not be under the kind of emotional distress that a potential personal injury client would be under when solicited by a lawyer. But nothing said in *Ohralik* seems to limit rules against in-person solicitation of clients by lawyers to rules barring soliciting personal injury clients in distress. In addition, as the Supreme Court noted in *United States v. Arthur Young and Co.*, 465 U.S. 805, 104 S.Ct. 1495, 79 L.Ed.2d 826 (1984), a client has a great deal to lose, for example, if an auditor gives a qualified, adverse or disclaimed opinion as to the accuracy of a company's financial records. *Id.* at 818 n.13, 104 S.Ct. at 1503 n.13. As such, while a soliciting CPA may not be in the posture of addressing an injured person, he can easily be in the position of addressing a client who has everything to gain from a glowing, unquestioning opinion, and everything to lose from any less favorable opinion. So, in addition to the problems that lurk whenever professionals are allowed to engage in face-to-face solicitation, there is an incentive for fraudulent CPAs to solicit clients by promising to overlook financial misstatements or by promising to give a favorable review. *See Id.* at 461, 98 S.Ct. 1921.

We should also recall how hard it is for a state to monitor in-person solicitations. Because of the heavy reliance that

the public places in the accuracy of financial statements reviewed by CPAs, *Florida Bank v. Max Mitchell & Co.*, 558 So.2d 9 (1990), and for other reasons that seem to apply to professionals in general, there is a strong state interest that CPAs be prevented from compromising their integrity by soliciting clients underhandedly. And, a ban on in-person solicitation is directly related to that state interest.

In *Ohralik*, the Court specifically noted that a "state does not lose its power to regulate commercial activity deemed harmful to the public wherever speech is a component of the activity." *Ohralik*, 436 U.S. at 456, 98 S.Ct. at 1919. Therefore, simply because Florida's regulation involves speech does not mean that the regulation must be struck down on constitutional grounds. The *Ohralik* Court said that "procurement of remunerative employment is a subject only marginally affected with First Amendment concerns. It falls within the State's proper sphere of economic and professional regulation." *Id.* at 459, 98 S.Ct. at 1920 (citations omitted). This point is to me the important one.

The First Amendment provides greater or lesser protection to speech depending on its context, that is, whether the speech is political, commercial or something else. The degree of protection afforded commercial speech is toward the low end of the scale. *See Ohralik*, 436 U.S. at 456, 98 S.Ct. at 1918 ("[C]ommercial speech [enjoys] a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values.... And, I believe the degree of protection from state interference is still lower when the states are carrying out their traditional and important job of policing the professions. The *Ohralik* Court specifically recognized that "[w]hile entitled to some constitutional protection," a professional's conduct is "subject to regulation in furtherance of important state interests." *Id.* at 459, 98 S.Ct. at 1920.

Even if I personally questioned that the Florida rule is necessary for an ordered CPA profession, it would not be my place just to second guess state officials about the state rule's wisdom or effectiveness. What is important for me to see is that reasonable people, such as those that I expect comprise the Florida Board of Accountancy, could think that the rule against in-person solicitation of clients functions to assure greater competence of CPAs, more reasoned selection of CPAs by lay people, and the accuracy of audit statements upon which the public relies. And, even if a less sweeping rule might do, that circumstance would be of no great significance. I cannot say that the rule Florida has chosen is an unreasonable solution to the problems inherent in uninvited, in-person solicitations of clients for profit. *See Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469, 480, 109 S.Ct. 3028, 3035, 106 L.Ed.2d 388 (1989) (manner of regulating speech need not be "absolutely the least severe that will achieve the desired end"; fit between ends and means need only be "reasonable").

I would uphold the Florida rule as a legitimate use of the state's authority to regulate a profession within its borders and, therefore, would vacate the judgment of the district court.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 90-3943

SCOTT FANE,

Plaintiff-Appellee,

versus

FRED H. EDENFIELD, JR., RICHARD J. ABOUD, WHIPPLE VAN NESS JONES, JR., MARGARET F. STROUPE, DEAN F. DENISON, WILLIAM R. MARTIN, JOSEPH R. MILLSAPS, ANTONIO L. ARGIZ, JEROME A. SCHINE, in their official capacities as members, Board of Accountancy,

Defendant-Appellants.

FILE COPY

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
DEC 31 1991
MIGUEL J. CORTEZ
CLERK

On Appeal from the United States District Court for the Northern District of Florida

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ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

Before: EDMONDSON and DUBINA, Circuit Judges, and ESCHBACH*, Senior Circuit Judge.

PER CURIAM:

(✓) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

UNITED STATES CIRCUIT JUDGE

ORD-42

* Honorable Jesse E. Eschbach, Senior U.S. Circuit Judge for the Seventh Circuit, sitting by designation.

BEST AVAILABLE COPY

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

SCOTT FANE,

Plaintiff,

v.

FRED H. EDENFIELD, JR., et al.,

Defendants.

Civil Case No.
TCA 88-40264-MMP

AFFIDAVIT OF LOUIS W. DOONER

My name is Louis W. Dooner. I was born in Tampa, Florida, June 18, 1928, attended local secondary schools and graduated from the University of Florida with a major in accounting in 1953.

Since graduation from college I have been in public accounting except for one year (1957-58) when I was controller of Three Bays Steamship Co., Miami, Florida. My public accounting career began in 1953 when I joined the staff of Price Waterhouse & Co. in New York City. After four years with that firm in their New York, Hartford and Atlanta offices and following one years absence from the profession I joined the staff of Morris and Grace, a local firm, in Coral Gables, Florida. In December of 1959 I moved to Quincy, Florida, to conduct a practice together with Mr. William D. Bell. This firm practices today under the name of Dooner, Edwards & Fletcher. In 1983 I became inactive in the day to day practice but serve as a consultant to the firm.

In December 27, 1979, I was appointed to the Florida Board of Accountancy and served as Chairman in 1981 and 1982. I was Chairman and or a member of the Probable

Cause Panel in 1980 and from 1983 to January 5, 1988, when my term on the board expired.

I served as President of the Florida Institute of Certified Public Accountants and also served on numerous committees as a member and/or chairman, including legislative policy and long range planning for which I was named outstanding Committee Chairman. I held numerous offices in both local chapter and state wide.

I have been a member of the American Institute of Certified Public Accountants since 1959 and served as a member of Council (governing body) for seven years and on and as chairman of numerous committees and task forces, also served as a member of the Auditing Standards Board which promulgates Generally Accepted Standards and as a member for three years and as chairman for three years of State Legislation Committee.

As a member of the National Association of State Boards of Accountancy I served on numerous committees including the Committee on legislation and regulation. I also served as a member of the special committee on relations with government. I designed what has come to be known as the Florida Project whereby the Florida Board of Accountancy and the Regional Inspectors General for federal agencies entered into an agreement of cooperation to better regulate audits, of organizations receiving federal funds. This project has now been adopted by and will soon be in place in thirty three states.

In November of 1988 I was named the Distinguished Alumnus of the Fisher School of Accounting, University of Florida, by Beta Alpha Psi, national honorary accounting fraternity.

I have been asked by defendant in this case to set forth my opinion as to the need and appropriateness of the ban

on direct, in-person, uninvited solicitation (rule 21A.24.002). My opinion as set forth below is based upon experiences as a practicing CPA and as a member of the Florida Board of Accountancy.

To more fully understand the ban on direct, in-person, uninvited solicitation by Certified Public Accountants in Florida it will be helpful to look briefly at the history of the profession in the United States.

In the late 1800's investors in England found that in order to be satisfied that their investments in America were being properly managed they enlisted the assistance of accountants to visit the business and report back as to the financial condition and results of operations of these far flung enterprises.

At first, these accountants traveled from England, but with travel and communication being as limited as it was in those days it was found that it was far more efficient for the accountants to remain in America and perform the required audit services. Around 1890 the State of New York enacted the first state law to license and regulate Accountants rendering opinions on financial statements based on an audit of the accounting records of the enterprise. These licensees became known as certified public accountants. Their sole purpose was to render opinions on financial statements.

In the early 1900's the, Florida legislature enacted a statute which provided for the licensure of qualified persons to render independent opinions on financial statements of others based on an audit of their account records.

Our present accountancy law provides that Certified Public Accountants are the only persons who may render opinions on financial statements of others based on an audit conducted in accordance with Generally Accepted Auditing

Standards. The independent opinion on financial statements is the only reason for the existence of a regulated public accounting profession.

As was stated earlier the profession was established for the purpose of auditing financial statements and it has been this function that has become so important to the financial community and to the economy of the United States. Without the independent audit it would be impossible to raise capital with which to finance industry. The profession has done an outstanding job in this area and has come to be one of the most highly respected and trusted professions in this country today.

Part of the development of this highly respected profession was the evolution of a code of conduct which assured the users of financial statements that the CPA who opined on the statements was independent of the subject of the statements and this independence had not been impaired in anyway including the solicitation of the client. The auditor's independence means that he is so free of his

client that he is willing to report the facts as they are found regardless that it may be detrimental to the client. If he has solicited the client he will be beholden to him.

In order to protect the integrity of opinions on financial statements public accountancy was defined to include all services rendered to the public by a CPA involving the use of accounting skills. This has meant over the years that the CPA conducted himself in the same manner whether the service was an audit or some other service.

As the volume of other services expanded the strict code of conduct applicable to audits came to be a hindrance to some CPA's who wanted to expand through advertising, solicitation, payment of finder fees and other means. Many of these CPA's have no desire to perform audits and in fact

do not. If they were not CPA's they would be free to conduct themselves in any legal manner they choose, rendering all services except audit without the burden of the high standards of the CPA.

The audit function is too important to the economic well being of this country to allow it to be torn down by a few who want the prestige and public trust that their predecessors have earned without being willing to continue to conduct themselves in a manner that will assure the continued integrity of opinions on financial statements. The ban on direct, in-person, uninvited solicitation is for the protection of users of financial statements. It is not to protect the public from solicitors.

It has been suggested that because the American Institute of Certified Public Accountants (AICPA) and the Florida Institute of Certified Public Accountants (FICPA) amended their rules to not prohibit direct, in-person, uninvited solicitation of a potential client, it means that these organizations are not in favor of such a ban. Nothing could be further from the truth. This action was taken initially by the AICPA to avoid action by the United States Department of Justice. It was the opinion of legal counsel that such a ban by a private organization would not be permitted under federal anti trust laws.

At the 1980 annual meeting of the AICPA a resolution was passed that called for a special committee to study the question and report back to the 1983 annual meeting which it did in the form of "Report of The Special Committee on Solicitation."

I served on that committee and can assure the court that the recommendations of that committee were not based on the fact that the members were desirous of eliminating the ban on direct, in-person, uninvited solicitation. The committee made five recommendations:

1. The AICPA Code of Professional Ethics should not contain a general prohibition of direct uninvited solicitation of potential clients or a narrower prohibition of oral direct uninvited solication of potential clients.

2. Rule 502 of the Code of Professional Conduct should be amended to prohibit certain forms of solicitation, as follows:
Rule 502—Advertising and Other Forms of Solicitation. A member shall not seek to obtain clients by advertising or other forms of solicitation in a manner that is false, misleading, or deceptive. Solicitation by the use of coercion, duress, compulsion, intimidation, threats, overreaching, or vexatious or harassing conduct is prohibited.

3. The board of directors should issue a policy statement expressing its view that members should exercise appropriate restraining if they elect to engage in the commercial practices of advertising and solicitation.

4. The AICPA should not develop a program to influence state legislatures to adopt more stringent solicitation bans than the AICPA itself can impose.

5. The AICPA should not require its members to file with the AICPA copies of all direct uninvited promotional literature simultaneously with, or within a reasonable time after, its dissemination to potential clients.

As can be seen from the foregoing quotations from the Report of the Special Committee on Solicitation the primary concern of the committee was the affect on the AICPA and not the merits of the issue from the standpoint of the public interest. We were very much concerned that if action was

taken by the FTC and the AICPA were required to sign a consent agreement it would contain a proscription against ever making an utterance on the subject as had occurred in the past with regard to prohibition on competitive bidding. It was felt that we would be better off to not have the ban and have the ability to speak on the subject than to not have the ban and not the ability to speak on the subject.

The ban on direct, in-person, uninvited solicitation is extemely narrow and only proscribes the uninvited contact whereby the potential client is required to make a response. It may be helpful to look at what is permitted under this rule.

1. May a CPA attend trade shows, luncheon clubs and other such meetings and engage in direct, in-person, solicitation?

   Yes, because those in attendance by their presence, have issued an invitation to be solicited.

2. May a CPA send a personal letter to a potential client requesting an appointment to discuss his qualifications to render services?

   Yes, because the decision to enter into the conversation rests with the potential client.

3. May a CPA send brochures and other advertising material to a particular member of management of a potential client?

   Yes, this activity as in the previous example places the responsibility for initiating personal contact with the potential client.

The only type of solicitation that a CPA may not engage in is that that places the potential client in the position of having to make an immediate oral response thus opening the door to overreaching and vexatious conduct by the CPA or conversely, and far more damaging to society, the

opportunity for the potential client to place the soliciting CPA in a compromising position as part of the bargain reached since the CPA is obviously in need of business and may be willing to bend the rules. Such activity is not in the best interest of the public which is so dependent on independent opinions on financial statements based on an audit conducted in accordance with generally accepted auditing standards.

• • •

Pursuant to 28 U.S.C. paragraph 1746, I hereby declare under the penalty of perjury that the foregoing is true and correct. Executed on January 4, 1989, Quincy, Florida.

Louis W. Dooner

STATE OF FLORIDA
COUNTY OF GADSDEN

On this 3rd day of January, 1989, before me, personally appeared LOUIS W. DOONER, to be known and known to me to be the person described in and who executed the above instrument and acknowledged to me that he executed the same.

Deborah G. McMillan
NOTARY PUBLIC

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

SCOTT FANE,

Plaintiff,

v.

FRED H. EDENFIELD, JR., *et al.*,

Defendants.

Civil Case No.
TCA 88-40264-MMP

SUPPLEMENTAL AFFIDAVIT OF SCOTT FANE

1. I am the plaintiff in this action, and I submit this supplemental affidavit in further support of plaintiff's motion for summary judgment.

2. I have carefully read both the memorandum that the defendants filed in opposition to my motion for summary judgment and the affidavit of Mr. Louis W. Dooner, and I believe that there are two points that require clarification.

3. First, contrary to the impression that might be drawn from defendants' submissions, there are many CPAs in active practice who rarely, if ever, exercise the attest function. Generally, the attest function is employed to verify the accuracy of financial statements used to raise capital — either from lending institutions or investors. Thus, CPAs engaged in the preparation or audit of such financial statements regularly "attest" to their accuracy. On the other hand, accountants like myself who specialize in corporate and individual tax seldom, if ever, exercise the attest function. This is also true in a number of other areas in which other CPAs specialize: financial planning, employee benefits, computer consulting, management information systems, estate planning and litigation support.

4. Thus, while the ability to attest to the accuracy of financial statements and audits is one factor that distinguishes CPAs from accountants and other financial professionals, it is only one of many factors, several of which may be even more important. To start with, CPAs alone are licensed, and hence have demonstrated their educational background, competence, expertise, and good moral character. Moreover, CPAs must take continuing education courses in accounting, and, for that person, must maintain a high level of professionalism. Finally, certain communications between CPAs and their clients are privileged under Florida law, which is a critical distinction between CPAs and accountants. Most corporate clients, and many individuals clients (particularly those who are wealthy), rely heavily on the fact that discussions with their CPAs are entirely confidential, and the ability to assure confidential handling of sensitive financial information is often the cornerstone of a CPA's relationship with a client.

5. Second, defendants' submissions can also be read to imply that a face-to-face solicitation, where the prospective client plays no role in initiating the conversation, is somehow fraught with the danger that in such circumstances a CPA might be willing to surrender his independence in order to secure business, and, conversely, a business may be inclined to attempt to entice a CPA to compromise his integrity. Indeed, defendants even suggest that a CPA engaged in solicitation may be more "willing to bend the rules" than CPAs who do not solicit.

6. Having practiced as a CPA and accountant in jurisdictions that do not prohibit direct, uninvited solicitation, I have extensive experience with in-person, direct, uninvited solicitation of clients by CPAs. I have engaged in such solicitation myself when I was in solo practice, and I have been employed at CPA firms — including two major, national firms — that also engaged in such solicitation. I am

unaware of any instance in which, during the course of such solicitation, a CPA offered to give-up his independence to secure a client or a business sought to entice a CPA to compromise his integrity by promising to send the CPA its work. In light of my experience, and in my professional opinion, that scenario is inherently implausible. To start with, there are powerful deterrents against such conduct by CPAs. Improperly exercising the attest function may well constitute fraud, which is both a crime and an intentional tort, and thus a CPA would be risking jail and financial ruin by knowingly engaging in such conduct. Moreover, if caught, the CPA would likely be stripped of his license, and subjected to public humiliation. For these reasons, CPAs are exceedingly careful before attesting to the accuracy of any financial information. Second, while a CPA engaged in direct solicitation is certainly seeking new business, generally his major interest is in securing long-term clients. Any businessman interested in obtaining a "clean" but undeserved financial opinion is, by definition, not a promising client.

7. While the defendants imply that the lack of familiarity between a CPA and potential client might be some sort of breeding ground for improper conduct, in my experience, and based on my professional opinion, the opposite is true. The only situation in which I can imagine a CPA compromising his independence is where a long-term client, with whom the CPA has developed a close relationship, is in serious trouble and needs a "clean" financial opinion. Perhaps in those circumstances a CPA might be persuaded to bend the rules to help his client. Even in those circumstances, however, most CPAs would place their independence above the needs of their client, if for no reasons than the enormous risks that giving a false certification would carry.

* * *

Pursuant to 28 U.S.C. § 1746, I hereby declare under the penalty of perjury that the foregoing is true and correct.

Scott Fane

Executed on: January 25, 1989